UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
v.	)	*Criminal No. 89-00033 P*
	)	
ALVARO ROJO-ALVAREZ, WALTER ANTONIO PALACIO-PEREZ, ADELBERTO FRANCO-MONTOYA and CARLOS AREVALO-GOMEZ,	)	
	)	
Defendants	)	

AMENDED RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

On June 20, 1989 the Grand Jury handed down a two-count indictment charging the defendants Alvaro Rojo-Alvarez, Walter Antonio Palacio-Perez, Adelberto Franco-Montoya and Carlos Arevalo-Gomez with conspiracy to possess, possession of, and aiding and abetting the possession of, all with intent to distribute, in excess of five kilograms of a substance containing cocaine in violation of 21 U.S.C. '' 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. ' 2.

Each of the defendants has filed a motion to suppress. All of them seek to suppress the contents of a black bag found in a certain automobile when it was stopped on June 16, 1989 as it was entering Congress Street in Portland, Maine from the Ramada Inn parking lot.[1] In addition, Franco-

[1] In their motions Arevalo-Gomez and Palacio-Perez seek to suppress *all* evidence seized from the automobile. However, in his memorandum Arevalo-Gomez makes clear that he seeks to suppress all evidence gained as a result of the search of the black bag. *See* Memorandum in Support of Motion to Suppress at unnumbered p. 10 (Memorandum Item 2M). Nothing in the hearing record suggests what other incriminating evidence beyond the contents of the black bag, if any, was seized from the vehicle.

Montoya seeks to suppress all statements made by him after his arrest.[2] Franco-Montoya and Rojo-Alvarez also have pending motions to sever. An evidentiary hearing was held before me on October 4, 1989. The last of the legal memoranda was filed on November 22, 1989. I recommend that the following findings of fact be adopted, that the motions to suppress be ***DENIED***, that Franco-Montoya's motion to sever be ***GRANTED*** and that Rojo-Alvarez's motion to sever be ***GRANTED*** in part and ***DENIED*** in part.

I. Proposed Findings of Fact

[2] Originally, Palacio-Perez also moved to suppress any statements made by him after his arrest but has since withdrawn the same. *See* Post Hearing Memorandum in Support of Defendant Perez' Motion to Suppress at p. 14 (Memorandum Item 7M).

In 1988, the United States Drug Enforcement Administration (``DEA") began an investigation of multi-kilogram cocaine trafficking in the Lewiston-Auburn, Maine area. T. 6.[3] By mid-May, 1989 DEA agents had developed a cooperating witness named Thomas Johnston who had previously received large quantities of cocaine in Maine from Florida through a Joel Burns. *Id.* At that time DEA Agent Michael Cunniff asked Johnston to call Burns by telephone in an effort to determine if Burns was willing to resume cocaine trafficking with him. *Id.* As a result of a series of telephone conversations between the two, Burns agreed to deliver 30 kilograms of cocaine in Maine. T. 8. DEA Agent Michael Bansmer, acting in an undercover capacity, was introduced to Burns as an intermediary in the transaction. T. 8-9. At a meeting held on June 3, 1989 at a Scarborough, Maine motel among Johnston, Burns, an associate of Burns named Kenneth Yeo, DEA Agent Bansmer and various other undercover agents, Burns and Yeo delivered 9 kilograms of cocaine to DEA Agent Bansmer and explained that delivery of the remaining 21 kilograms would follow payment for the 9 kilograms. T. 11-12. Following delivery of the 9 kilograms, Burns and Yeo were arrested. T. 11. Thereafter, they elected to cooperate with the government and identified their source as a person known to them as ``Juliano" or ``Memo" (ultimately identified as Guillermo Marin-Gaviria). T. 12-13.

Burns and Yeo explained that they had picked up the cocaine in Queens, New York City from a person known to them as ``Fran" (subsequently identified as defendant Rojo-Alvarez) and that Fran's source was known to them as ``Nelson" (subsequently identified as defendant Franco-Montoya). T. 13-14, 26. As part of the undercover investigation, Burns negotiated by telephone with Marin-Gaviria for delivery of the remaining 21 kilograms of cocaine and/or payment for the 9 kilograms already delivered. T. 17. These negotiations led to a meeting in a Newark, New Jersey hotel lounge on June

[3] All transcript references are to Volume I unless Volume II is specifically cited. All references following a citation to Volume II are to Volume II exclusively.

6, 1989 among Burns, Johnston, DEA Agent Bansmer and Marin-Gaviria. T. 17-18. DEA Agent Cunniff was also present at the same hotel lounge in a surveillance capacity and observed two other men he later came to know as defendants Rojo-Alvarez and Franco-Montoya also watching the meeting from a corner of the lounge. *Id.*

As a result of conversations which took place at the meetings held on June 6 and 7 in Newark, Marin-Gaviria traveled to Maine. T. 18. On June 10, 1989 he met with DEA Agent Bansmer, Yeo and Burns at a Scarborough motel where they discussed again the 21 kilograms of cocaine yet to be provided and payment for the 9 kilograms already delivered. *Id.* Also discussed was the possibility of returning the 9 kilograms already delivered if payment was not immediately available. T. 18. When Marin-Gaviria indicated that he intended to leave Maine in order to explore delivery of the remaining 21 kilograms of cocaine, he was arrested whereupon he, too, agreed to cooperate with the government. T. 18-19.

Marin-Gaviria identified the source of the cocaine which was the subject of the transaction as defendants Rojo-Alvarez and Franco-Montoya. T. 19-20. As part of the continuing investigation, he made a series of telephone calls to Rojo-Alvarez and Franco-Montoya. T. 20. At one point Franco-Montoya told Marin-Gaviria that he was sending Rojo-Alvarez to Maine to work out the details of payment for or the return of the 9 kilograms of cocaine already delivered. *Id.* On June 13, 1989 Burns and Marin-Gaviria picked up Rojo-Alvarez at the bus station in Portland and drove him to the Hampton Inn, a motel located in South Portland. T. 21-22. Rojo-Alvarez told Marin-Gaviria and Burns that Franco-Montoya wanted payment for the cocaine already delivered or its immediate return. T. 22. He also told them that Franco-Montoya worked for a group in Colombia known as the Palestinians which he explained was so named because of their violence. T. 22-23.

On June 15, 1989 a meeting took place at Denny's Restaurant on Congress Street in Portland among Rojo-Alvarez, Marin-Gaviria, Burns and DEA Agent Bansmer at which 8 of the 9 kilograms of cocaine delivered on June 3, 1989 were displayed to Rojo-Alvarez to reassure him and his associates that the transaction scenario was real. T. 24-25.

On June 10, 1989 Burns and Marin-Gaviria were at the Susse Chalet, a motel located on Congress Street in Portland, when Burns encountered Rojo-Alvarez, Franco-Montoya and two other men (subsequently identified as defendants Palacio-Perez and Arevalo-Gomez). T. 26-27. When Marin-Gaviria returned to the lobby, which he had left to do an errand, Palacio-Perez and Arevalo-Gomez were seated with his wife and children. T. 26. Marin-Gaviria encountered Rojo-Alvarez and Franco-Montoya in another part of the lobby where Franco-Montoya told him he wanted either the money or a return of the 9 kilograms of cocaine. *Id.* All of the defendants except Rojo-Alvarez left the motel. T. 27. Rojo-Alvarez told Marin-Gaviria that Franco-Montoya instructed him to remain with him and his family until the cocaine was returned or payment for it was made. *Id.*

Burns notified DEA Agent Bansmer that the four men had confronted Marin-Gaviria and a surveillance was initiated. T. 27-28. The surveillance officers ultimately located all four defendants at the Maine Mall to which by this time Marin-Gaviria and his family had been moved. T. 27-28. Burns went to the Mall and distracted Rojo-Alvarez allowing Marin-Gaviria and his family to escape. T. 28. The surveillance team observed Franco-Montoya, Arevalo-Gomez and Palacio-Perez in the vicinity of Burns' truck which, on instructions from DEA agents, he had left in the Mall parking lot. T. 28-29. Either Palacio-Perez or Arevalo-Gomez was observed entering Burns' truck and getting under its dashboard. T. 29.

After a series of telephone conversations took place during the afternoon and early evening of June 16, 1989 involving continuing negotiations for the return of or payment for the cocaine, DEA

Agent Bansmer instructed Franco-Montoya to go to the Ramada Inn on Congress Street in Portland and stand by the bank of telephones. T. 29-30. Agent Bansmer spoke to both Rojo-Alvarez and Franco-Montoya and told either one or both of them that, if they wanted to recover the cocaine, it was located in a Subaru automobile which had been parked behind the Ramada Inn and that the key for the automobile was on top of one of the tires. T. 31-32.

Surveillance officers observed a two-door hatchback Nissan 280Z automobile with Virginia plates occupied by the four defendants arrive at the Ramada Inn and approach the Subaru located in the rear. T. 32, II. 19. Palacio-Perez exited the Nissan. *Id.* Surveillance officers observed him go to the Subaru, retrieve the key, remove the black nylon bag containing the 8 kilograms of cocaine and place the bag in the Nissan. T. 32, 135, 139. The Nissan was then driven toward the Ramada Inn entrance and, a minute or two later, out the ramp from the Ramada Inn leading onto Congress Street where it was stopped at the DEA's request by two Portland police officers, Sullivan Rizzo and Lisa Coburn, who had been assigned to cover the perimeter of the Ramada Inn. T. 32-33, 146-147. Located in the vehicle at the time of the stop were defendants Franco-Montoya, Arevalo-Gomez and Palacio-Perez. T. 34. Franco-Montoya was the driver. T. 116, 159-60. As the Nissan was being driven out of the Ramada Inn parking lot, defendant Rojo-Alvarez was observed running from the lobby of the Ramada Inn toward Congress Street and was also reported to have been seen under a tree immediately opposite the Ramada Inn lobby where he was found hiding and was arrested. T. 34-35.

Within seconds of the stop of the Nissan, six or eight other officers arrived at the arrest scene. T. 149. The arresting officers were members of the Portland Police Department's Special Response Team who were called in to assist narcotics officers make an arrest of four individuals described to them as Colombians. T. 172. They had also been variously advised in briefings held earlier in the day that in all probability the suspects were heavily armed and dangerous or that weapons could be

involved. T. 134, 154, 175, 179, II. 6, 30. Officers Rizzo and Coburn were specifically advised to use extreme caution in stopping the Nissan and in dealing with the suspects and were instructed to conduct whatever procedures they considered appropriate to preserve their own safety and that of the suspects. T. 33-34.

The Special Response Team's role was to secure the scene and to make sure no weapons were present. T. 183. The officers at the scene employed a felony stop procedure in removing the occupants from the vehicle. T. 116, 150, 156-63, 174-82, II. 12-18. One of the three occupants was seated in the rear. T. II. 14, 17. After the occupants were removed from the vehicle and while they were being secured, Officer Richard Betters entered the passenger compartment of the vehicle and conducted a search for weapons. T. 116, 178, II. 14, 18, 25, 36. In the process he found in the rear hatch area of the vehicle, which he accessed from the rear seat, a black nylon bag containing kilogram-sized packages of a substance he believed at the time to be cocaine. T. 178, II. 19-20. No weapons were found on the defendants or in the Nissan. T. 66.

Upon their arrest, which took place at approximately 9:00 p.m. on June 16, 1989, the four defendants were taken to the U.S. Immigration Service lockup in Portland for processing. T. 36, 137. Defendant Franco-Montoya was given his *Miranda* rights twice; on both occasions they were read to him in Spanish from a DEA rights form by INS Agent Thomas Taber who speaks Spanish. T.II. 39, 41, 47-48, 51; Govt. Ex. 8. The first time was approximately 11:00 p.m. and the second time between 11:51 p.m. and midnight. T. 121-22, II. 60-61. INS Agent Taber specifically asked Franco-Montoya if he understood his rights and if he was willing to answer any questions. T. II. 48-49, 51-52. On each occasion Franco-Montoya responded in the affirmative to both questions. T. 37-38, II. 49-52. However, he was not provided an opportunity to make a statement when he was given his *Miranda*

rights the first time and did not do so at that time. T. 122, II. 60. In fact, Franco-Montoya made no statement concerning his knowledge of the drug transaction until he was given his rights the second time. T. 48, II. 51, 61. The interview of Franco-Montoya, which began between 11:51 p.m. and midnight on June 16, 1989 and followed the second recitation of *Miranda* rights, was conducted by DEA Agent Cunniff in a typical business office located within the INS facilities. T. 39, 121-22, II. 61. (Although the office was intended for use by an INS attorney, INS has no attorney in its Portland office. T. 39.) The interview was conducted principally in English. T. 38. INS Agent Taber was present throughout. T.II. 52-53. Before he began to question Franco-Montoya, DEA Agent Cunniff inquired of him about his ability to speak English. *Id.* Franco-Montoya indicated that he has lived in the United States for ten years and speaks English very well. *Id.* DEA Agent Cunniff had no difficulty understanding Franco-Montoya during the course of his statement. T. 39, 126. At no time did Franco-Montoya indicate that he did not want to make statements. T. II. 52. In addition to making a statement, Franco-Montoya consented to a search of his motel room and of the Nissan which he had been driving at the time of his arrest. T. 41, 116.

Although Arevalo-Gomez was also given his *Miranda* rights and agreed to talk to the agents, he made no incriminating statements. T. 48-49, 56, 60-61, II. 77-78, 81-82.

II. Legal Discussion

A. Standing of Rojo-Alvarez

The government challenges defendant Rojo-Alvarez's standing to contest the validity of the search and seizure of the contents of the black bag at the time of the vehicle stop and defendants'

arrest. The challenge is based on the fact that Rojo-Alvarez was not present at the search of the black bag and has not shown a legitimate and reasonable expectation of privacy in its contents.

The burden of establishing standing is on the defendant. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Melucci*, No. 89-1387, slip op. at 4 (1st Cir. Nov. 1, 1989) [888 F.2d 200, ____ (1st Cir. 1989)]. To have standing Rojo-Alvarez must have had a legitimate expectation of privacy in the black bag at the time of the search. *Id.* Thus, Rojo-Alvarez must establish that he had a subjective expectation of privacy in the bag and that the expectation was objectively reasonable. *Melucci*, slip op. at 4. Factors which have been recognized as bearing on a legitimate expectation of privacy are ownership, possession or control of the thing searched, the ability to control or exclude use of that thing by others and the totality of the surrounding circumstances. *Id.* The defendant argues that he had the requisite privacy expectation based on his claims that: (i) he co-owned the cocaine found in the black bag, (ii) the cocaine had been returned to him and his co-defendants, and (iii) all of the defendants were taking precautions to insure that the contents of the bag were kept private.

Rojo-Alvarez did not testify at the suppression hearing and has not filed a declaration asserting an ownership interest in the cocaine. However, in his brief he does appear to concede that the cocaine was his property. *See* Defendant Rojo-Alvarez' Post Hearing Memorandum of Law at p. 3 (Memorandum Item 8M). Yet, it is not at all clear from the suppression hearing record that Rojo-Alvarez was an owner of the cocaine or that it was given back to him along with his co-defendants rather than to its true owner. The evidence presently before the court suggests that, of the four defendants, the likely owner was Franco-Montoya and that Rojo-Alvarez was simply one of his trafficking agents. In any event, the mere ownership of an item does not itself establish the requisite privacy expectation. *Rawlings*, 448 U.S. at 105.

Moreover, once Rojo-Alvarez exited the vehicle he no longer was in a position to assert possession or control of the black bag. Nor was he then in a position to control or exclude the use of the black bag by others. Finally, Rojo-Alvarez's claim that he and his co-defendants had taken precautions to insure that the contents of the black bag were kept private will not wash. However reliable Rojo-Alvarez may have thought such precautions to be, the fact remains that when he left the vehicle prior to its movement toward Congress Street and the resulting police stop he was necessarily relying entirely on his co-defendants to maintain that privacy interest since they then had exclusive possession and control of the bag.

Rojo-Alvarez has failed to meet his burden of proving a legitimate expectation of privacy in the black bag at the time of the vehicle stop. The suppression hearing record reflects neither a subjective expectation or privacy at the time of the search nor any objectively reasonable basis for such an expectation. Because ```Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted,'" *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)), Rojo-Alvarez has no standing to contest the validity of the search of the black bag and the seizure of its contents.

B. Suppression of Fruits of the Vehicle Search [4]

None of the defendants argues that the law enforcement authorities lacked probable cause to stop the Nissan automobile as it was being driven out of the Ramada Inn parking lot. Indeed, having placed the cocaine-filled black bag in the Subaru and having observed its transfer by defendant Palacio-

[4] Should the court conclude that defendant Rojo-Alvarez has standing to contest the validity of the search and seizure, this discussion applies as well to him as to the other defendants.

Perez to the Nissan, with the apparent knowledge and acquiescence of the other defendants, as well as the subsequent movements of the Nissan just moments later, it is clear that they had probable cause not only to stop the vehicle but also to arrest its occupants for possession of cocaine. Because the search of the black bag located in the vehicle was effected without a warrant, the issue is whether the warrantless search was justified.

The government, which has the burden of establishing the availability of an exception to the warrant requirement of the Fourth Amendment, *United States v. Jeffers*, 342 U.S. 48, 51 (1951), relies on two recognized exceptions: (1) the ``automobile exception," *see United States v. Ross*, 456 U.S. 798 (1982), and (2) the ``search incident to arrest exception," *see New York v. Belton*, 453 U.S. 454 (1981). I conclude that the ``automobile exception" does not apply but that the ``search incident to arrest exception" does.

Automobile Exception

Relying on *Ross*, the government argues that it was entitled to search the entire vehicle and any containers found therein without a warrant. The ``automobile exception" was first articulated in *Carroll v. United States*, 267 U.S. 132 (1925), wherein the Court held that ``a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment." *Ross*, 456 U.S. at 799. In *Ross*, the Court defined the permissible scope of a warrantless search of an automobile and held that, ``[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825. The Court also stated its holding as follows: ``We hold that the scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Id.*

A thorough understanding of *Ross* requires a consideration of the prior cases of *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *Robbins v.* California, 453 U.S. 420 (1981). In *Chadwick*, the Court affirmed the decision of the Court of Appeals for the First Circuit which upheld the suppression of marihuana found in a footlocker taken by the police from the truck of an automobile and searched without a warrant in circumstances where the police had probable cause to believe that the footlocker contained contraband even before it was placed in the automobile. Distinguishing the degree of privacy recognized in an automobile from that of luggage, the Court observed that ``a person's expectations of privacy in personal luggage are substantially greater than in an automobile." Chadwick, 433 U.S. at 13. In *Sanders*, the Court held impermissible the warrantless search of a suitcase in circumstances similar to those in *Chadwick*. However, the *Sanders* Court went beyond *Chadwick* in broadly suggesting that a warrantless search of a vehicle could never justify the warrantless search of a container found in it. Unlike *Chadwick* and *Sanders*, *Robbins* did not involve a case of suspicion focused on a specific container. Rather, when the driver of a lawfully stopped station wagon opened the door police officers smelled marihuana but had no clue where in the vehicle it was located. A search of the vehicle first disclosed marihuana in the passenger compartment and then two wrapped packages in the covered recessed luggage compartment at the rear. The officers proceeded to open the packages and discovered more marihuana. The *Robbins* plurality rejected the notion that there is a constitutional distinction between searches of luggage and searches of ``less worthy" containers, reasoning that ``all containers are equally protected by the Fourth Amendment unless their contents are in plain view." *Ross*, 456 U.S. at 815. It then ruled that the warrantless search of the wrapped packages was unjustified because *Chadwick* and *Sanders* made clear that ``a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." *Robbins*, 453 U.S. at 425.

In *Ross*, the police received a tip from a reliable informant who was an eyewitness to sales of narcotics by Ross that he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics. No specific container was identified. They searched the entire car, including closed packages they found in the trunk. The Court upheld the warrantless search of the closed containers found in the car's trunk. In doing so, the Court rejected that part of the reasoning in *Sanders* which suggested that a warrantless search of a vehicle could never justify the warrantless search of a container found in it, but adhered to its holding in that case. However, despite its thorough discussion of *Chadwick*, the *Ross* Court never intimated that *Chadwick* was no longer good law or was in any respect compromised by *Ross*. Indeed, it distinguished *Chadwick* and *Sanders* by noting that, while in those cases the police had probable cause to search not the entire vehicle but only the footlocker and suitcase, respectively, in *Ross* there was probable cause to search the entire vehicle. *Ross*, 456 U.S. at 816-17. The holding of *Ross*, that if probable cause justifies the search of a lawfully stopped vehicle it justifies the search of every part of it and its contents that may conceal the object of the search, applies only in cases where it is not known precisely where in the vehicle or in what container in the vehicle the contraband is located.

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. at 824. Where, as in this case, probable cause regarding the presence of contraband is focused solely on a particular closed container known to be in the vehicle, a warrantless search of the closed

container is not rendered permissible by the ``automobile exception." *See id.* at 839 (Marshall, J. dissenting). Unless another recognized exception applies, such cases are instead controlled by *Chadwick* which ``reaffirmed the general principle that closed packages and containers may not be searched without a warrant." *Id.* at 812. *See also United States v. Salazar*, 805 F.2d 1394, 1396-98 (9th Cir. 1986); *Castleberry v. State*, 678 P.2d 720 (Okla. Crim. App. 1984), *aff'd by equally divided Court sub nom. Oklahoma v. Castleberry*, 471 U.S. 146 (1985); *United States v. Farinacci-Garcia*, 551 F. Supp. 465 (D.P.R. 1982).[5]

Search Incident to Arrest Exception

[5] This court's opinion in *United States v. Baumwald*, 720 F. Supp. 226 (D. Me. 1989) (Carter, J.), is not to the contrary. There, the government had probable cause to believe that contraband was located in the trunks and cargo areas of certain vehicles. Only those areas were searched without a warrant. *Id.* at 229. There is no suggestion in the opinion that the contraband was enclosed in containers or packages; rather it appears the contraband was in plain view once the trunks and cargo areas themselves were opened. *Id.*

In the alternative, the government argues that the warrantless search was justified as an incident to a lawful arrest. I agree. The authorities had probable cause to arrest the occupants of the Nissan at the time of the stop. This probable cause was in no respect dependent on the fruits of the vehicle search. Rather, it derived from the certain knowledge that the occupants were in possession of cocaine. It does not matter that the search of the vehicle may have preceded the arrests in light of the fact that the arrests effectively took place, at the latest, ``quickly on the heels of the challenged search." *Rawlings v. Kentucky*, 448 U.S. at 111. It was, for all relevant purposes, contemporaneous with the arrests. Thus, the search of the passenger compartment, including the rear hatch area,[6] comes within the permissible boundaries of the ``search incident to arrest exception" formulated in *New York v. Belton*:

> [W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

[6] The rear hatch area is included because it was within reach of the arrestee who was seated in the rear of the Nissan. *See Belton*, 453 U.S. at 460.

> It follows from this conclusion that the police may also examine the contents of any containers within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is opened or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.[7]

New York v. Belton, 453 U.S. at 460-61 (footnotes and citations omitted).

C. Suppression of Statements of Franco-Montoya

Franco-Montoya seeks to suppress all statements made by him after his arrest based on his dual assertions that, when he gave those statements, he had not waived his Fifth Amendment right not to incriminate himself and they were, in any event, involuntary. Specifically, Franco-Montoya contends that when he was first read his *Miranda* rights he gave no indication that he wished to waive them and, in fact, he made no statement thereafter or even indicated that he wished to make a statement after being asked to do so. He argues that, under these circumstances, it must be presumed he did not waive his right to remain silent and therefore invoked that right rendering impermissible the interrogation which DEA Agent Cunniff later initiated. He also asserts that he was unable to effectively understand DEA Agent Cunniff's interrogation and was unable to communicate verbally thereby critically impairing his capacity for self-determination necessary to establish voluntariness.

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[7] *Belton* establishes a bright-line test which is not dependent on the presence of exigent circumstances. In any event, contrary to the defendants' claim, exigent circumstances arose when it became clear the defendants were about to exit the Ramada Inn parking lot in the Nissan. The fact that the law enforcement authorities might have obtained a search warrant earlier is immaterial. *See*

United States v. Baumwald, 720 F. Supp. at 230-31, and cases cited therein.

Contrary to the defendant's assertion, he did indicate that he wished to waive his *Miranda* rights when he was given them the first time and affirmatively stated that he was willing to talk with the agents. The fact that he was not interrogated and therefore made no incriminating statements until after he was given his *Miranda* rights the second time does not undermine the effectiveness of his original waiver. Indeed, INS Agent Taber explained that the defendant was not given an opportunity to make a statement when he was first read his *Miranda* rights. Thus, assuming that his waiver was made voluntarily, knowingly and intelligently, *Miranda v. Arizona*, 384 U.S. 436, 445 (1966), the predicate for Franco-Montoya's argument that it must be presumed that he invoked his right to remain silent is lacking and the argument must fail.

The government bears a heavy burden to demonstrate waiver. *Id.*; *United States v. Montgomery*, 714 F.2d 201, 203 (1st Cir. 1983). However, it is clear from the suppression hearing record that this defendant did waive his *Miranda* rights on both occasions voluntarily, knowingly and intelligently. His rights were read to him from a printed card in his first language, Spanish, by a Spanish-speaking INS agent. He was specifically asked if he understood his rights. He indicated that he did. He was asked if he was willing to answer any questions. He stated that he was. In answer to DEA Cunniff's queries concerning his ability to speak English, he stated that he has been in this country for ten years and speaks English very well. DEA Agent Cunniff had no difficulty understanding him during the course of the interrogation. At no time did Franco-Montoya indicate that he was reluctant or unwilling to make statements or that he did not understand DEA Agent Cunniff's questions. The record is devoid of any suggestion of a lack of understanding by Franco-Montoya of his rights, of an unwillingness to talk to the law enforcement authorities or of an inability to communicate effectively in English. Accordingly, the government has fully satisfied its burden of establishing waiver.

D. Severance of Trials

Franco-Montoya has moved to sever his trial from that of his co-defendants based on the fact that even if his statements are admissible against him they are not admissible against the others under *Bruton v. United States*, 391 U.S. 123 (1968). Rojo-Alvarez has moved to sever his trial from that of Franco-Montoya and Arevalo-Gomez based on his understanding that each of them has made incriminating statements to law enforcement officers which are not admissible against him under *Bruton*.

The government does not oppose Franco-Montoya's motion. If my recommended decision as to the proper disposition of Franco-Montoya's motion to suppress his statements is accepted, then there clearly is a *Bruton* problem requiring the severance of Franco-Montoya's trial from that of the other defendants. However, Rojo-Alvarez is mistaken in his understanding that Arevalo-Gomez also made incriminating statements. The suppression hearing record makes clear that he did not. Accordingly, there is no basis for severing Rojo-Alvarez's trial from that of Arevalo-Gomez.

III. Conclusion

For the foregoing reasons, I recommend that the motions to suppress of all defendants be ***DENIED*** (including the motion to suppress of Palacio-Perez to the extent that it covers evidence seized from the passenger compartment of the Nissan, including the rear hatch area accessible from the back seat); that the motion to sever of Franco-Montoya be ***GRANTED***; and that the motion to sever of Rojo-Alvarez be ***GRANTED*** as to Franco-Montoya but ***DENIED*** as to Arevalo-Gomez.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 20th day of December, 1989.

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David M. Cohen
United States Magistrate